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HAROLD B. WILLEY,

# Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 582

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
*Petitioner,*

*v.*

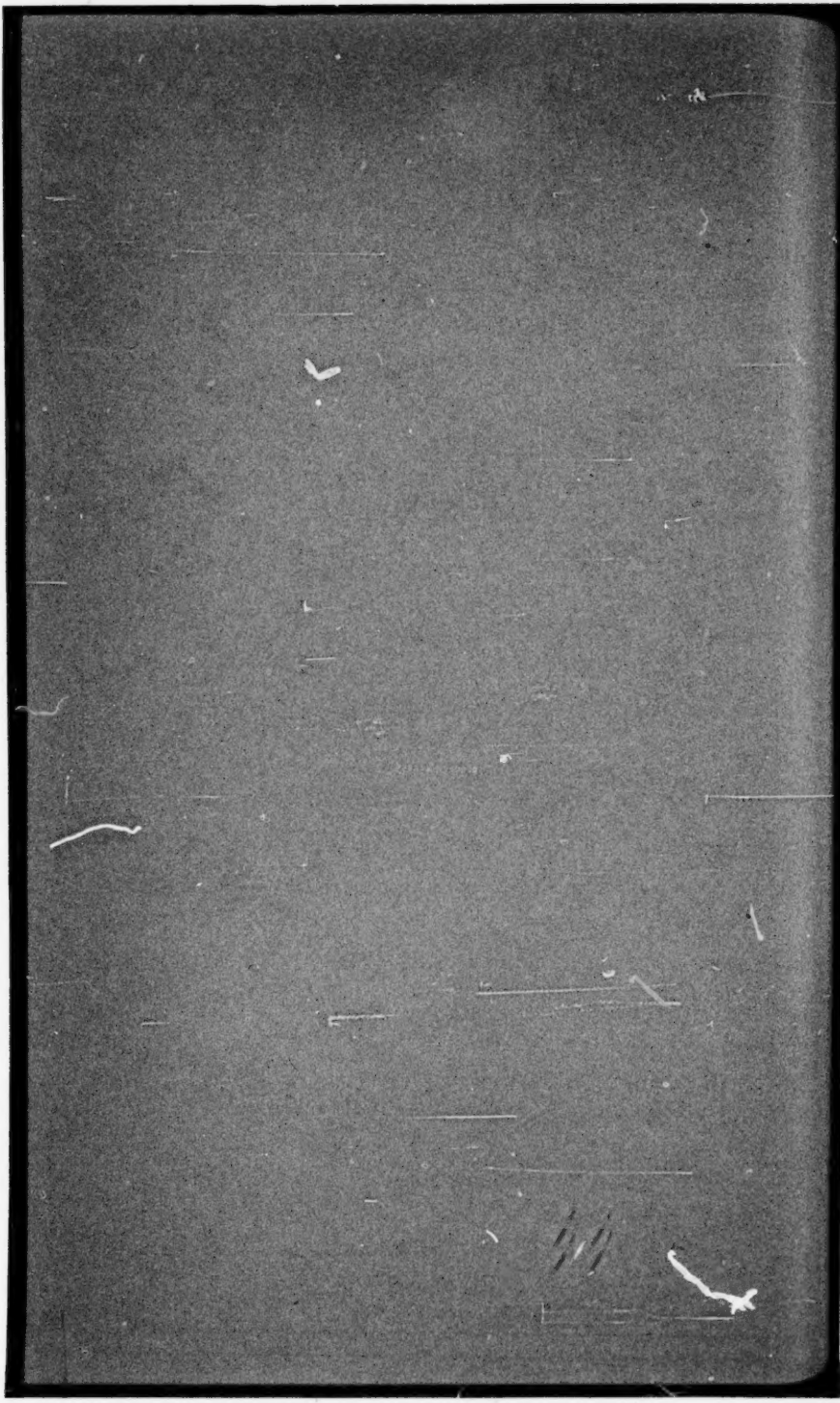
ELLEN E. ZERMANI, ADMINISTRATRIX,
*Respondent.*

## PETITION FOR CERTIORARI
AND
## BRIEF IN SUPPORT THEREOF.

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No.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
*Petitioner,*

*v.*

ELLEN E. ZERMANI, ADMINISTRATRIX,
*Respondent.*

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## PETITION FOR CERTIORARI.

The petition of the New York, New Haven and Hartford Railroad Company respectfully shows:

### Summary and Short Statement of Matter Involved.

The United States Court of Appeals for the First Circuit, in a case arising under the Federal Employers' Liability Act and involving issues of negligence and of proximate causation which could not be taken from the jury, held that, even if the trial judge omitted entirely to instruct the jury on the law of proximate causation, such an error would not harm the defendant and petitioner (hereinafter called the Railroad) against whom the jury

returned a verdict of $141,500. The Court of Appeals further held that, even if the Railroad was harmed by such error, the Railroad could not complain, because, after counsel for the Railroad had requested the trial judge to amend his jury charge by including instructions on proximate cause, and after the trial judge refused on the ground that he had already given such instructions, counsel for the Railroad did not respond to or comment further on the trial judge's refusal. The Court of Appeals construed Rule 51 of the Federal Rules of Civil Procedure as requiring such a response or comment.

The Railroad contends that the respondent and plaintiff (hereinafter called the administratrix) made out a prima-facie and forceful case below against the Railroad on two among several accusations of negligence, but that no act by the Railroad was necessarily a proximate cause of the harm as a matter of law. Therefore it was vital to the Railroad that the jury be instructed on proximate cause. The Railroad further contends that the appellate court's construction of Rule 51 encourages disrespect by counsel to the United States District Court, requires trial counsel to argue with a trial judge to protect his client's rights, is unreasonable, and is basically unfair to the Railroad. This holding of the Court of Appeals is in conflict with the following cases decided in the Second, Third, and Fourth Circuits:

*Moreau* v. *Pennsylvania R. Co.*, 166 F. (2d) 543, 545 (3 Cir., 1948).

*Green* v. *Reading Co.*, 183 F. (2d) 716, 719 (3 Cir., 1950).

*Wright* v. *Farm Journal*, 158 F. (2d) 976 (2 Cir., 1947).

*Smith* v. *Gay*, 190 F. (2d) 719 (4 Cir., 1951).

Finally the Railroad contends that the error of the trial court below was a refusal to inform the jury of a requirement (proof of proximate causation) which the administratrix's case had to meet before the jury could find for her. The result of this error in substance was a withholding from the jury of an integral, essential issue in the case; the Railroad was deprived of an opportunity to have this issue decided by the jury, a state of affairs warranted only if the issue of proximate cause could have been decided against the Railroad as a matter of law. This issue should not have been decided as a matter of law, and to do so violated the principles of law announced by this court in *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 87 L. Ed. 610 (1943); *Bailey* v. *Central Vermont Railway, Inc.*, 319 U.S. 350, 87 L. Ed. 1444 (1943); *Owens* v. *Union Pacific Railroad Co.*, 319 U.S. 715, 87 L. Ed. 1683 (1943), and *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 88 L. Ed. 239 (1943). In these cases this court held that questions should not be decided as a matter of law where the evidence and tendencies of the proof are conflicting, and that to withdraw them is violative of the rights of employees and their dependents. It is submitted that the rule must work both ways and that it .s also violative of the employer's rights to decide such questions as a matter of law.

**Jurisdictional Statement.**

(*a*) Jurisdiction to grant this petition is sustained by Title 28, U.S.C. sec. 1254, Act of June 25, 1948, c. 646, 62 Stat. 928.

(*b*) The statute of the United States applied by the United States Court of Appeals for the First Circuit is 45 U.S.C. sec. 51, Act of April 22, 1908, c. 149, sec. 1, 35 Stat.

65; August 11, 1939, c. 685, sec. 1, 53 Stat. 1404, which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

The Court of Appeals also applied Federal Rules of Civil Procedure Nos. 51 and 61, Title 28, U.S.C., which read as follows:

"RULE 51.—INSTRUCTIONS TO JURY: OBJECTION.

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

"RULE 61.—HARMLESS ERROR.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

(*c*) The judgment of the Court of Appeals for the First Circuit was entered December 8, 1952, and a petition for rehearing was denied December 19, 1952 (R. 182). This petition for certiorari was filed February 2, 1953.

**Questions Presented.**

(*a*) When a reasonable juryman at the trial below could have exonerated the Railroad completely by finding for the Railroad on the issue of proximate cause, was the error of refusing to instruct the jury on the law of proximate cause harmless to the Railroad under Federal Rule of Civil Procedure No. 61?

(*b*) When counsel requested instructions to the jury and when the trial judge refused the request, saying his charge as already given satisfied the request, under Federal Rule of Civil Procedure No. 51 was counsel obliged to make any further comment to the judge?

**Reasons Relied upon for Allowance of the Writ.**

In a Federal Employers' Liability Act case the Court of Appeals has substantially approved the taking of a question from the jury over the Railroad's protest, even without ruling that the question should be decided against the Railroad as a matter of law. This Honorable Court has given abundant indication that it considers the preservation of the jury function in Federal Employers' Liability Act cases a matter of substance and importance. The Court of Appeals' ruling lacks accord with this court's decisions, heretofore cited, which embody this indication.

This frustration of the jury's function was accomplished by the trial court's refusal to inform the jury in the charge that the question of proximate causation existed for the jury to decide. It is important to the fairness and efficiency of the administration of justice under the Federal Employers' Liability Act that what this court has forbidden to be done by one means be clearly forbidden to be done by all means.

The Court of Appeals has produced a forced construction of Federal Rule of Civil Procedure No. 51 which is highly undesirable, for two reasons. The first: as thus construed this rule requires counsel to place himself in jeopardy of citation for contempt if he is adequately to protect his client's standing to appeal from an error of omission in the jury charge. The second: this construction of Rule 51 conflicts with the manner in which the rule is administered in three other appellate circuits.

WHEREFORE this petitioner prays that a writ of certiorari be issued by this court to the Court of Appeals for the First Circuit, to the end that the decision of said court may be reviewed by this honorable court.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

By EDMUND J. MOORE,
PAUL F. PERKINS,
*Its Counsel.*

NOEL W. DEERING,
WILLIAM Q. KEENAN,
*Of Counsel.*

# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

## Opinion of Courts Below.

The verdict of the jury was rendered on February 7, 1952 (R. 8), and pursuant thereto the court rendered judgment on February 8, 1952 (R. 9). On February 28, 1952, the defendant's motion for a new trial was denied (R. 168). The opinion of the Court of Appeals for the First Circuit is set forth at R. 173 and is not yet reported.

## Grounds on which Jurisdiction of the Supreme Court of the United States is Invoked.

The judgment of the United States Court of Appeals for the First Circuit was entered on December 8, 1952 (R. 182), and on December 19, 1952 the petitioner's petition for rehearing was denied (R. 182). Petition for writ of certiorari was filed February 2, 1953. The decision of the Court of Appeals is based upon its application of section 1 of the Federal Employers' Liability Act, Title 45, U.S.C. sec. 51, Act of April 22, 1908, c. 149, sec. 1, 35 Stat. 65; August 11, 1939, c. 685, sec. 1, 53 Stat. 1404, and upon its application of Federal Rules of Civil Procedure Nos. 51 and 61, Title 28 U.S.C.A. The jurisdiction of the Supreme Court of the United States is invoked under Title 28, U.S.C. sec. 1254, Act of June 25, 1948, c. 646, 62 Stat. 928.

## Statement of the Case.

John T. Zermani, the administratrix's intestate, died as the result of injuries suffered in the course of his employ-

ment as a railroad brakeman in Taunton, Massachusetts, on August 25, 1951 (R. 42, 114, 100). The accident which gave rise to the case at bar occurred in the course of a railroad switching operation which required a string of cars to be moved northward past a switching point, and then to be redistributed southward, some on the track whence they came, No. 1, and some on a parallel track, No. 6 (R. 114-117; Ex. 2, R. 161, 19). The appellee's intestate was injured when he fell from a moving car which he had boarded after it had begun to move (R. 27-28, 40-42; Ex. 2, R. 164, 53, 57). The relevant events which led to Zermani's boarding this car began when the train crew made inoperative the individual automatic braking mechanisms on the cars to be switched, by an operation known as bleeding. When operative these mechanisms locked the brakes of any car which was not coupled to a locomotive. They had to be rendered inoperative because the switching or classification operation required these cars to be propelled southward, uncoupled from the locomotive, to the various tracks where they were to be made up in trains (R. 24-25, 46, 49, 65-66, 115-116, 141-144).

To bleed a car one pulls and holds an iron rod which in turn operates a valve allowing air to escape from a pressure chamber, thus removing the source of power which makes the automatic air brakes operative (R. 45). If one fails to hold this bleeder rod long enough to permit all the air to escape, some braking pressure will continue to be applied to the wheels of the car, preventing it from coasting as freely and rapidly when uncoupled from its locomotive as it would otherwise (R. 47, 24). The only way by which a car can be rendered mobile while uncoupled from a locomotive is to bleed it, an operation which, as stated above, requires attention to be given to each car individually which is being rendered thus mobile (R. 45).

When the cars to be classified had been moved northward, Zermani rode the first one southward to track No. 6 and brought it to a halt by using its hand brake (R. 22, 38, 117, 124). Next Zermani's fellow brakeman, William Howard (R. 20, 72), rode four cars southward, coupled together, to track No. 1 and in the same manner brought them to a halt (R. 22, 38; Ex. 4, R. 164, 53, 56; R. 72-73, 124). Because these cars by their inertia could be counted on to stop all subsequent cars rolled southward on tracks Nos. 1 and 6, they made unnecessary the use of a hand brake to halt such subsequent cars sent southward uncoupled from the engine. For this reason all subsequent cars were rolled southward without anyone aboard them. In accordance with the instructions of Francis A. McAloon, the conductor of the Railroad's switching crew and the man in charge of the operation (R. 113, 114), Zermani was to remain on track No. 6 to tend the cars sent to him, and Howard was to remain on track No. 1 for a like purpose (R. 22, 77-78, 81, 116-118).

Next McAloon caused a sixth car to be propelled southward uncoupled from the locomotive and destined for track No. 6. Because the air in its automatic brake reservoir had not been completely bled, it came to a halt by partial application of its automatic brakes south of the switching lead to track No. 1, but at the Danforth Street Crossing (Ex. 2, R. 161, 119) short of its intended destination (R. 24, 38, 125; Ex. 4, R. 164, 53, 56-57). Zermani, observing it, walked northward to the crossing, which was close to the switching point, and completed bleeding its brake reservoir (R. 26; Ex. 4, R. 164, 53, 56-57).

While Zermani was thus occupied, McAloon caused cars Nos. 7, 8 and 9 to be propelled southward, uncoupled from the engine, destined for track No. 1 (R. 26-27, 29, 31, 38-40, 117, 128, 135). The hand brake and ladder leading to it on car No. 9 were situated at the car's south end, *i.e.*,

the end in the direction of the car's movement (R. 28). When all but the last half length of car No. 9 had cleared the crossing, Zermani stepped up on the crossing (R. 27). When the car had completely cleared the crossing, Zermani ran around it to its west side and then turned to run in a southerly direction (R. 28, 40; Ex. 4, R. 164, 53, 57). Zermani mounted the ladder leading to the brake on car No. 9, but he did not reach the top of the ladder, the only position from which he could have operated the hand brake aboard car No. 9 (R. 42). Zermani was last seen by Emil A. Berube, the switch tender at the Danforth Street Crossing at the time of the accident (R. 17). Berube saw Zermani in a manner "as though a man would be boarding a ladder" (R. 41). He then saw Zermani's lantern go up in the air (R. 40, 41). Moments later he heard Zermani "holler" (R. 42) and rushed down to him (R. 42) and saw him lying on the ground beside car No. 9 (R. 28, 33, 40). Berube asked him: "How did it happen, Johnny? Did you get to the top of the ladder?" Zermani answered: "No, I didn't, Emil. I didn't quite make it" (R. 42).

These last three cars were brought to a halt by the first four cars previously dispatched to track No. 1, and their speed at the time of their impact was seven miles per hour (R. 73-74). One witness (a switch-tender) testified that the usual switching speed was four miles per hour (R. 31, 17). The record contains no evidence of whether Zermani fell from car No. 9 before or after this impact, nor was there evidence that this impact resulted in any damage to equipment or injury to any person other than Zermani. Reports made in the ordinary course of business by the Railroad's employees indicate that the car which Zermani boarded was not harmed by the impact (Ex. 4, R. 163-164, 53; Ex. 6, R. 166, 59).

The record contains evidence of three and only three times at which McAloon gave Zermani orders in the course

of the classification operation. Before the operation began, McAloon ordered Zermani to handle cars rolling southward to track No. 6 (R. 37, 77-78, 81, 116-118) and not to go on track No. 1 (R. 116). When Zermani had secured car No. 1 on track No. 6 he walked northward towards the Danforth Street Crossing (R. 23-24). McAloon's uncontradicted testimony was: "When Mr. Zermani was coming up off of track 6 I says to him, I had my light in my left hand and slip in the right. I says, 'Johnny, see if there is any air in that car on 6' " (R. 118). McAloon was referring to car No. 6, which had stopped at the crossing. Then McAloon and Berube bled cars Nos. 7, 8 and 9, and McAloon caused them to begin their roll southward. After they had begun to move, McAloon called to Zermani: "Bleed that car" (R. 27, 39-40), again referring to car No. 6. At the time of the last order there was noise of cars moving in the yard (R. 27, 138).

Finally, there was adduced evidence that the brake head, a part of the hand brake on car No. 9, may have been defective, but this defect in no way affected the efficiency with which the brake might be operated (Ex. 3, R. 162, 49; R. 61-63).

On appeal to the Court of Appeals for the First Circuit the Railroad relied on the following statement of error below:

> "The trial judge erred, over timely exception of the defendant, in failing to instruct the jury that the plaintiff could recover for no harm which was not proximately caused by negligence of the defendant." (R. 170.)

The Court of Appeals disposed of this assignment of error on three alternative grounds:

(*a*) Some acts of negligence of which the Railroad was accused were proximate causes of the harm as a matter of law. These were McAloon's orders to Zermani and an act of negligence which the Court of Appeals designated as "the conduct and supervision of the classification operation viewed as a whole" (R. 179). Therefore (presumably) there was no issue of proximate cause in the case, the administratrix was entitled to peremptory instructions on proximate cause, and the Railroad had no standing to request any instructions on the question.

(*b*) The omission of these instructions did not deprive the Railroad of its substantial rights within the meaning of Federal Rule of Civil Procedure No. 61 (R. 179).

(*c*) Counsel for the Railroad did not comply with Federal Rule of Civil Procedure No. 51 by stating distinctly before the jury retired the Railroad's objection to the trial court's omission of these instructions. The Court of Appeals stated:

"The record shows that after the court had completed charging the jury at the bench conference, the following colloquy occurred:

" 'Mr. Moore: On behalf of the defendant, I call attention to the fact that in describing negligence to the jury no mention was made that that negligence should be the proximate cause of the injury and I ask that the jury be instructed on that.

" 'The Court: I meant to say that.

" 'Mr. Moore: I also ask your Honor to charge request No. 8, which you have not.

" 'The Court: You can have that, exception. I said that negatively. Anything else?'

> The reasonable interpretation of this exchange is that when the trial judge informed counsel that he 'meant to say that', he was indicating that he believed his charge had covered adequately the issue of proximate cause. Counsel refrained from any response to this, but went on to his next objection without further comment." (R. 179.)

Thus the Court of Appeals has held as a matter of law that in the case at bar no instructions on proximate causation need be given the jury because as a matter of law there was no jury issue of proximate cause in the case.

**Specifications of Errors.**

The Court of Appeals erred in holding as a matter of law that any negligence of the Railroad proximately caused the administratrix harm.

The Court of Appeals erred in holding that the trial court's withholding from the jury of the issue of proximate cause did not deprive the Railroad of a substantial right and was not inconsistent with substantial justice within the meaning of Federal Rule of Civil Procedure No. 61.

The Court of Appeals erred in holding that counsel for the Railroad did not comply with Federal Rule of Civil Procedure No. 51 by objecting distinctly to the trial judge's refusal to instruct the jury on the law of proximate causation.

**Summary of Argument.**

I.

The case at bar arose under the Federal Employers' Liability Act and contained a jury issue on the question of

proximate causation concerning which the Railroad adduced substantial and persuasive proof in the Railroad's favor. The court gave the jury no instructions whatsoever on the law of proximate cause. This was error because in substance it withheld an issue of fact from the jury. This error was harmful because, if this issue had been given to the jury, the Railroad's evidence would abundantly have supported a verdict for the Railroad.

II.

Federal Rule of Civil Procedure No. 51 requires counsel to state his objections to an omission from the jury charge distinctly and before the jury retires. There can be no question that counsel for the Railroad did so, whereupon the trial judge declined to act on counsel's objection on the ground that there was no such omission from the charge as counsel contended. The Court of Appeals erred in holding that Rule 51 required counsel to make a reply or to "comment further" after this reply from the trial judge.

## Argument.

I.

As can be indicated fully in the Railroad's brief if this petition is granted, the administratrix had great difficulty below in making out a prima-facie case of negligence. Moreover, two items of negligence of which the Railroad was accused, concerning which evidence was adduced, and which went to the jury, clearly were not proximate causes of the administratrix's harm, and with this the appellate court agreed:

> "The appellant contends that each item of alleged negligence, taken separately, does not provide a reasonable basis for an inference of negligence which proximately caused Zermani's death. Although *this*

> *may be true of the worn brakehead on the fatal car and of the failure to bleed completely car 6, . . .*" (Emphasis supplied.) (R. 176.)

From the evidentiary point of view three propositions are true of the case at bar: (1) On the evidence, and absent the jury's verdict, it is far from clear that the Railroad was negligent at all. (2) It is clear that no negligence of the Railroad can be said as a matter of law to have proximately caused the administratrix's harm. (3) It is abundantly clear that *some* negligence of the Railroad as a matter of law *did not* proximately cause the administratrix's harm. In this posture of the case it was vital to the Railroad that the jury be obliged to make a finding of proximate causation as a condition precedent to a finding of liability; therefore it was vital that the jury be instructed on the law of proximate cause.

The reactions of the Court of Appeals to these propositions were as follows: (1) The jury may not have been charged on proximate cause, but the court declines to rule definitively; it is true that the Railroad may have been entitled to such a charge, but again the court declines to rule:

> "It is true that some instructions to the jury with reference to proximate cause are necessary for adequate consideration of most negligence actions. Perhaps the omission was erroneous." (R. 178.)

(2) The jury's verdict was determinative on the question whether the Railroad was negligent (R. 177). (3) In spite of the fact that a cause at least partially contributory to the administratrix's harm was Zermani's voluntary act in boarding a moving car, the orders given him and the overall conduct of the operation *as a matter of law* proximately caused the harm:

> "As a matter of law, the one supervised would be endangered by negligent supervision." (R. 178-179.)

(4) In spite of the fact that *some* alleged and proved negligence of the Railroad as a matter of law *did not* proximately cause the administratrix's harm, it was unnecessary to instruct the jury on the law of proximate cause:

> "We perceive no prejudice to appellant in the charge which affects its substantial rights. Federal Rules of Civil Procedure 61." (R. 179.)

Thus the Court of Appeals erred in the following particulars:

(1) It declined to rule whether proximate causation was an issue in the case. This was error because Zermani's intervening act in boarding car No. 9 *could* reasonably have been found by the jury to be the *sole proximate* cause of his injury.

(2) The Court of Appeals declined to rule whether the jury was instructed at all regarding proximate cause. This was error because this issue was liminal in the appeal. (A review of the jury charge as set forth in the appellate opinion (R. 178) indicates that the charge stated no vestige of the law of proximate causation. The charge is reported in the Record at pp. 149-159.)

(3) The appellate court found support for the jury's verdict by ruling that the administratrix had made out a prima-facie case on the Railroad's negligence with respect to the "over-all conduct and supervision of the classification operation." This was error because no such negligence was placed in issue by the pleadings, and because such an accusation of negligence is so imprecise that, if it were set forth in a pleading, it would be open to a motion to make more definite, a defense against it being impos-

sible. To permit such an issue to go to the jury would amount substantially to shifting the burden of proof from the plaintiff to the defendant.

(4) The appellate court erred in ruling that *as a matter of law* this alleged negligence and the alleged improper supervision of Zermani by McAloon, the conductor, were proximate causes of the administratrix's harm. This was error because Zermani's intervening act in boarding car No. 9 could *reasonably* have been found to be the *sole* proximate cause of his injury. This erroneous ruling clearly conflicts with this honorable court's construction of the Federal Employers' Liability Act in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, 93 L. Ed. 208 (1949).

(5) The Court of Appeals erred because the above ruling on causation, even if it were correct, could not be determinative of the case, and was therefore irrelevant. The administratrix accused the Railroad of two other acts of negligence, the operation of car No. 6 with an incompletely bled air brake reservoir, and the operation of car No. 9 with a defective brakehead. Neither, as admitted by the appellate court (R. 176), was a proximate cause of the administratrix's harm. Yet each, along with all other issues raised by the administratrix, went to the jury as possible bases for a finding of liability. Therefore, in the absence of proper instructions on proximate causation, the jury was at liberty to find liability on either of these bases. On the other hand, while the Court of Appeals ruled that, *if* the over-all conduct of the classification operation and McAloon's supervision of Zermani were negligent, as a matter of law they proximately caused the harm, the Court of Appeals did not and could not have ruled that the over-all conduct of the classification operation and McAloon's supervision of Zermani *as a matter of law were* negligent. The jury could have and *might have* found these aspects of the switching operation free of negligence, thus ren-

dering academic the ruling of law that they proximately caused the harm.

(6) Therefore the Court of Appeals erred in ruling that, when the jury was permitted to base a verdict of liability on a finding that car No. 6 was negligently bled or that car No. 9 was negligently operated with a defective brakehead, no substantial right of the Railroad under Federal Rule of Civil Procedure No. 61 was abridged by leaving the jury in ignorance that these facts were irrelevant *unless accompanied by an additional finding that they proximately caused the accident.* The only basis upon which Federal Rule 61 can be said to render this trial error compatible with substantial justice is the fact that there was available another theory of recovery upon which the jury's verdict could, but need not necessarily, have rested, namely, that McAloon's supervision of Zermani or the over-all conduct of the operation was negligent, and that one of these proximately caused the accident. This view of Rule 61 is squarely in conflict with a decision in the Ninth Circuit, *Pacific Greyhound Lines* v. *Zane,* 160 F. (2d) 731, 737 (9 Cir., 1947). Also see *Central Dispensary & Emergency Hospital* v. *Harbaugh,* 174 F. (2d) 507 (App. D.C., 1949).

Therefore the Railroad asks that certiorari issue in the case at bar because the Court of Appeals' decision conflicts with a comparable ruling made in *Pacific Greyhound Lines* v. *Zane,* 160 F. (2d) 731, 739 (9 Cir., 1947), and because the decision's rationale is based on a ruling of law lacking compliance with this honorable court's construction of the Federal Employers' Liability Act in *Coray* v. *Southern Pacific Co.,* 335 U.S. 520, 93 L. Ed. 208 (1949).

## II.

Possibly the Court of Appeals as well as the Railroad entertains doubts concerning the rulings discussed above

because, having cited five inapplicable precedents—*Williams* v. *Powers*, 135 F. (2d) 153 (6 Cir., 1943); *McDonald* v. *Jarka Corp.*, 144 F. (2d) 53 (2 Cir., 1944); *Blair* v. *Cullom*, 168 F. (2d) 622 (2 Cir., 1948); *Alaska Pacific Salmon Co.* v. *Reynolds Metals Co.*, 163 F. (2d) 643 (2 Cir., 1947); and *Alcara* v. *Jean Jordeau, Inc.*, 138 F. (2d) 767 (3 Cir., 1943)—the appellate court held counsel for the Railroad not to have complied with Federal Rule of Civil Procedure No. 51, thereby construing Rule 51 in a manner conflicting with its construction in *Moreau* v. *Pennsylvania Railroad Co.*, 166 F. (2d) 543, 545 (3 Cir., 1948); *Green* v. *Reading Co.*, 183 F. (2d) 716, 719 (3 Cir., 1950); *Wright* v. *Farm Journal*, 158 F. (2d) 976 (2 Cir., 1947); and *Smith* v. *Gay*, 190 F. (2d) 719 (4 Cir., 1951).

Rule 51 requires counsel, if he objects to an omission in a jury charge, to state his objection to the court distinctly before the jury retires. Counsel for the Railroad attempted to do that by saying to the trial judge below, before the jury retired:

> "On behalf of the defendant, I call attention to the fact that in describing negligence to the jury no mention was made that that negligence should be the proximate cause of the injury and I ask that the jury be instructed on that." (R. 159.)

To this the trial judge's reply was: "I meant to say that" (R. 159). Of this reply the Court of Appeals said:

> "The reasonable interpretation of this exchange is that when the trial judge informed counsel that he 'meant to say that', he was indicating that he believed his charge had covered adequately the issue of proximate cause." (R. 179.)

The Court of Appeals held the Railroad not to have complied with Rule 51 because—

> "Counsel refrained from any response to this, but went on to his next objection without further comment."

The Railroad submits that the appellate court is perfectly correct in stating that the only reasonable interpretation of the trial judge's reply was that he believed his charge had covered adequately the issue of proximate cause. In other words, the statement "I meant to say that" amounted to "I've already said that." Counsel knew that the trial judge had given the jury no instructions on the law of proximate causation whatsoever, in other words, had not "already said that," but counsel had no clue to the reason why the trial judge *thought* he had done so. In sharp and revealing contrast to the case at bar is *Rosenfeld* v. *Curtis Publishing Co.*, 163 F. (2d) 660 (2 Cir., 1947), cited by the Court of Appeals, which held that Rule 51 requires counsel to bring to the trial court's attention any mistake of the trial court *of which counsel is or ought to be aware* in the exercise of reasonable competence and perspicuity as an attorney and officer of the court.

In this posture of the case at bar the appellate ruling required counsel at the trial below, if he desired to comply with Rule 51, to ask one of the two following questions of the trial judge because they were the only comments of any relevancy open to counsel:

> "Why, your Honor, do you believe you have already adequately covered the issue of proximate cause?"
>
> or
>
> "Your Honor, may I repeat or insist on my attempt, in behalf of the defendant, to call attention to the fact

> that in describing negligence to the jury no *mention was made* that that negligence should be the proximate cause of the injury, and may I repeat or insist on my request that the jury be instructed on that?"

The Railroad earnestly submits that either of these responses or "further comments" would have been disrespectful to the trial court, would be calculated to incur a trial judge's reasonable displeasure, and would amount to argument with rather than before a trial court.

This holding of the Court of Appeals therefore makes it desirable that certiorari issue because of the extremely unfortunate effects this holding will have on the administration of justice, and because it conflicts with constructions of Rule 51 in the Second, Third and Fourth Circuits, as indicated above.

## III.

The only issue in this case met squarely by the Court of Appeals was the question whether the Railroad complied with Rule 51, and that question, the Railroad submits, was answered erroneously. Otherwise the opinion of the appellate court below is a continuous retreat from one ruling to another, each imprecise, insecure and inadequate to support its predecessor or successor. The appellate court suggests that proximate cause was an issue in the case but refuses to admit it, wonders whether the charge included an instruction on proximate cause but declines to decide, asserts that two aspects of the Railroad's alleged negligence proximately caused the accident as a matter of law but declines to cite precedent or to indicate the materiality of this, and finally retires behind the shrubbery of Rule 61 to the implication that, even if error taints the foregoing,

the Railroad's case was so poor that it was deprived of no substantial right when the trial court declined to submit the issue of proximate cause to the jury. It is because none of this provides a sure and sound basis for affirming the judgment below that the Court of Appeals has to turn its attention to the Railroad's standing to assign these errors on appeal. And this standing is impeached on the basis of an astoundingly tortuous construction of the Federal Rules of Civil Procedure.

Therefore thirdly the Railroad petitions this honorable court for a writ of certiorari because the Railroad has been denied plain, simple justice.

**Conclusion.**

It is respectfully submitted that this petition for writ of certiorari should be granted.

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